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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 BANK OF NEW YORK MELLON,

8 Plaintiff(s),

9 v.

10 SOUTHERN HIGHLANDS COMMUNITY  
11 ASSOCIATION, et al.,

12 Defendant(s).

Case No. 2:16-CV-1177 JCM (VCF)

ORDER

13  
14 Presently before the court is defendant Southern Highlands Community Association's (the  
15 "HOA") motion for summary judgment. (ECF No. 73). Plaintiff Bank of New York Mellon  
16 ("BNYM") filed a response. (ECF No. 79).

17 Also before the court is BNYM's motion for summary judgment. (ECF No. 74). The HOA  
18 (ECF No. 78) and SFR Investments Pool 1, LLC ("SFR") (ECF No. 81) responded, to which  
19 BNYM replied (ECF Nos. 82, 85).

20 Also before the court is defendant SFR's motion for summary judgment. (ECF No. 75).  
21 BNYM responded (ECF No. 80), to which SFR replied (ECF No. 84).

22 **I. Facts**

23 This case involves a dispute over real property located at 11545 Cantina Terlano Place, Las  
24 Vegas, Nevada 89141 (the "property"). On August 11, 2005, Salma Khan obtained a loan in the  
25 amount of \$838,150.00 to purchase the property, which was secured by a deed of trust recorded  
26 on October 10, 2005. (ECF No. 1).

27 The deed of trust was assigned to BNYM via an assignment of deed of trust recorded on  
28 December 23, 2009. (ECF No. 1).

1 On January 27, 2011, defendant Alessi & Koenig, LLC (“A&K”), acting on behalf of the  
2 HOA, recorded a notice of delinquent assessment lien, stating an amount due of \$895.02. (ECF  
3 No. 1).

4 On April 12, 2011, Khan recorded a loan modification agreement increasing the principal  
5 balance under the loan to \$1,000,706.62. (ECF No. 1).

6 On April 20, 2011, A&K recorded a notice of default and election to sell to satisfy the  
7 delinquent assessment lien, stating an amount due of \$2,161.47. (ECF No. 1). On September 8,  
8 2011, A&K recorded a notice of trustee’s sale, stating an amount due of \$3,709.87. (ECF No. 1).  
9 On July 11, 2012, SFR purchased the property at the foreclosure sale for \$9,200.00. (ECF No. 1).  
10 A trustee’s deed upon sale in favor of SFR was recorded on July 24, 2012. (ECF No. 1).

11 On May 25, 2016, BNYM filed the underlying complaint. (ECF No. 1). On October 12,  
12 2016, BNYM filed an amended complaint, alleging seven causes of action: (1) quiet  
13 title/declaratory judgment against all defendants; (2) breach of NRS 116.1113 against A&K and  
14 the HOA; (3) wrongful foreclosure against A&K and the HOA; (4) injunctive relief against SFR;  
15 (5) deceptive trade practices against A&K and the HOA; (6) judicial foreclosure against Khan;  
16 and (7) alternative claim for breach of contract against Khan. (ECF No. 12).<sup>1</sup>

17 On October 24, 2016, SFR filed an answer and counterclaim against BNYM for quiet  
18 title/declaratory relief and injunctive relief. (ECF No. 19).

19 On July 3, 2017, the court dismissed claims (2) through (5) of BNYM’s amended complaint  
20 (ECF No. 12), as well as claim (2) of SFR’s counterclaim (ECF No. 19). (ECF No. 72). The court  
21 also denied SFR’s motion for partial summary judgment (ECF No. 51) pursuant to Article III’s  
22 prohibition against advisory opinions. *Id.*

23 In the instant motions, the HOA, BNYM, and SFR each move the court to grant summary  
24 judgment in its favor as to the last remaining cause of action alleged in BNYM’s amended  
25 complaint: quiet title/declaratory relief. The court will address each parties’ motions as it sees fit.  
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<sup>1</sup> BNYM voluntarily dismissed Khan. (*See* ECF No. 48).

## II. Legal Standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

By contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the non-moving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*

1 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
2 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
3 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
4 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,  
5 631 (9th Cir. 1987).

6 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
7 conclusory allegations that are unsupported by factual data. See *Taylor v. List*, 880 F.2d 1040,  
8 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
9 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
10 for trial. See *Celotex*, 477 U.S. at 324.

11 At summary judgment, a court’s function is not to weigh the evidence and determine the  
12 truth, but to determine whether there is a genuine issue for trial. See *Anderson v. Liberty Lobby,*  
13 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all  
14 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the  
15 nonmoving party is merely colorable or is not significantly probative, summary judgment may be  
16 granted. See *id.* at 249–50.

### 17 **III. Discussion**

18 In the HOA and SFR’s motions, they contend that summary judgment in their favor is  
19 proper because, *inter alia*, the foreclosure sale extinguished BNYM’s deed of trust pursuant to  
20 NRS 116.3116 and *SFR Investments*. (ECF Nos. 73, 75). The HOA and SFR further contend that  
21 the foreclosure sale should not be set aside because the price paid at the foreclosure sale was  
22 commercially reasonable, the HOA complied with all notice requirements under NRS 116, BNYM  
23 has not shown fraud, unfairness, or oppression as outlined in *Shadow Wood Homeowners Assoc.*  
24 *v. N.Y. Cmty. Bancorp., Inc.*, 366 P.3d 1105 (Nev. 2016) (“*Shadow Wood*”), and because BNYM  
25 failed to tender the super-priority portion of the lien. (ECF Nos. 73, 75). The court agrees.

26 Under Nevada law, “[a]n action may be brought by any person against another who claims  
27 an estate or interest in real property, adverse to the person bringing the action for the purpose of  
28 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require

1 any particular elements, but each party must plead and prove his or her own claim to the property  
2 in question and a plaintiff's right to relief therefore depends on superiority of title." *Chapman v.*  
3 *Deutsche Bank Nat'l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (internal quotation marks and  
4 citations omitted). Therefore, for plaintiff to succeed on its quiet title action, it needs to show that  
5 its claim to the property is superior to all others. *See also Breliant v. Preferred Equities Corp.*,  
6 918 P.2d 314, 318 (Nev. 1996) ("In a quiet title action, the burden of proof rests with the plaintiff  
7 to prove good title in himself.").

8 Section 116.3116(1) of the NRS gives an HOA a lien on its homeowners' residences for  
9 unpaid assessments and fines. Nev. Rev. Stat. § 116.3116(1). Moreover, NRS 116.3116(2) gives  
10 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as  
11 "[a] first security interest on the unit recorded before the date on which the assessment sought to  
12 be enforced became delinquent." Nev. Rev. Stat. § 116.3116(2)(b).

13 The statute then carves out a partial exception to subparagraph (2)(b)'s exception for first  
14 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investments Pool 1 v. U.S. Bank*, the  
15 Nevada Supreme Court provided the following explanation:

16 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,  
17 a superpriority piece and a subpriority piece. The superpriority piece, consisting of  
18 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement  
charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all  
other HOA fees or assessments, is subordinate to a first deed of trust.

19 334 P.3d 408, 411 (Nev. 2014) ("*SFR Investments*").

20 Chapter 116 of the Nevada Revised Statutes permits an HOA to enforce its superpriority  
21 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, "NRS 116.3116(2) provides an HOA a true  
22 superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *Id.* at 419; *see*  
23 *also* Nev. Rev. Stat. § 116.3116(2)(1) (providing that "the association may foreclose its lien by sale"  
24 upon compliance with the statutory notice and timing rules).

25 Subsection (1) of NRS 116.3116 provides that the recitals in a deed made pursuant to  
26 NRS 116.3116 of the following are conclusive proof of the matters recited:

- 27 (a) Default, the mailing of the notice of delinquent assessment, and the recording  
28 of the notice of default and election to sell;  
(b) The elapsing of the 90 days; and  
(c) The giving of notice of sale[.]

1 Nev. Rev. Stat. § 116.31166(1)(a)–(c).<sup>2</sup> “The ‘conclusive’ recitals concern default, notice, and  
2 publication of the [notice of sale], all statutory prerequisites to a valid HOA lien foreclosure sale  
3 as stated in NRS 116.31162 through NRS 116.31164, the sections that immediately precede and  
4 give context to NRS 116.31166.” *Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc.*,  
5 366 P.3d 1105 (Nev. 2016) (“*Shadow Wood*”).

6 Based on *Shadow Wood*, the recitals therein are conclusive evidence that the foreclosure  
7 lien statutes were complied with—*i.e.*, that the foreclosure sale was proper. *See id.*; *see also*  
8 *Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC*, No. 70653, 2017 WL 1423938, at \*2  
9 (Nev. App. Apr. 17, 2017) (“And because the recitals were conclusive evidence, the district court  
10 did not err in finding that no genuine issues of material fact remained regarding whether the  
11 foreclosure sale was proper and granting summary judgment in favor of SFR.”). Therefore,  
12 pursuant to *SFR Investments*, NRS 116.3116, and the recorded trustee’s deed upon sale in favor of  
13 SFR, the foreclosure sale was proper and extinguished the first deed of trust.

14 Notwithstanding, the court retains the equitable authority to consider quiet title actions  
15 when a HOA’s foreclosure deed contains statutorily conclusive recitals. *See Shadow Wood*  
16 *Homeowners Assoc.*, 366 P.3d at 1112 (“When sitting in equity . . . courts must consider the  
17 entirety of the circumstances that bear upon the equities. This includes considering the status and  
18 actions of all parties involved, including whether an innocent party may be harmed by granting the  
19 desired relief.”). Accordingly, to withstand summary judgment in the HOA and SFR’s favor,  
20 BNYM must raise colorable equitable challenges to the foreclosure sale or set forth evidence  
21 demonstrating fraud, unfairness, or oppression.

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22  
23 <sup>2</sup> The statute further provides as follows:

24 2. Such a deed containing those recitals is conclusive against the unit's  
25 former owner, his or her heirs and assigns, and all other persons. The receipt for the  
26 purchase money contained in such a deed is sufficient to discharge the purchaser  
from obligation to see to the proper application of the purchase money.

27 3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164  
28 vests in the purchaser the title of the unit’s owner without equity or right of  
redemption.

Nev. Rev. Stat. § 116.31166(2)–(3).

1 In its motion for summary judgment, BNYM sets forth the following relevant arguments:  
2 (1) the foreclosure sale is invalid because NRS Chapter 116 is facially unconstitutional pursuant  
3 to *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016), *cert.*  
4 *denied*, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017) (“*Bourne Valley*”); (2) its  
5 predecessor-in-interest offered to pay the superpriority portion of the lien, which adequately  
6 preserved the first deed of trust; (3) the foreclosure sale was commercially unreasonable; (4) SFR  
7 is not a bona fide purchaser; and (5) *SFR Investments* should not be applied retroactively. (ECF  
8 No. 74). The court will address each in turn.

9 While the court will analyze BNYM’s equitable challenges regarding its quiet title, the  
10 court notes that the failure to utilize legal remedies makes granting equitable remedies unlikely.  
11 *See Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass’n*, 646 P.2d 549, 551  
12 (Nev. 1982) (declining to allow equitable relief because an adequate remedy existed at law).  
13 Simply ignoring legal remedies does not open the door to equitable relief.

14 **A. Unconstitutionality of NRS 116**

15 BNYM contends that *Bourne Valley* renders any factual issues concerning actual notice as  
16 irrelevant. (ECF No. 74). BNYM thus maintains that it need only “show that the foreclosure and  
17 extinguishment of BNYM’s rights occurred pursuant to NRS 116.” *Id.*

18 BNYM has failed to show that *Bourne Valley* is applicable to its case. Despite BNYM’s  
19 erroneous interpretation to the contrary, *Bourne Valley* did not hold that the entire foreclosure  
20 statute was facially unconstitutional. At issue in *Bourne Valley* was the constitutionality of the  
21 “opt-in” provision of NRS Chapter 116, not the statute in its entirety. Specifically, the Ninth  
22 Circuit held that NRS 116.3116’s “opt-in” notice scheme, which required a HOA to alert a  
23 mortgage lender that it intended to foreclose only if the lender had affirmatively requested notice,  
24 facially violated mortgage lenders’ constitutional due process rights. *Bourne Valley*, 832 F.3d at  
25 1157–58. As identified in *Bourne Valley*, NRS 116.3116(2)’s “opt-in” provision  
26 unconstitutionally shifted the notice burden to holders of the property interest at risk—not NRS  
27 Chapter 116 in general. *See id.* at 1158.

1 Further, the holding in *Bourne Valley* provides little support for BNYM as BNYM's  
2 contentions are not predicated on an unconstitutional shift of the notice burden, which required it  
3 to "opt in" to receive notice. BNYM does not argue that it/its predecessor-in-interest lacked notice,  
4 actual or otherwise, of the event that affected the deed of trust (*i.e.*, the foreclosure sale). Rather,  
5 BNYM merely complains about the content of the recorded notices. (*See, e.g.*, ECF No. 74 at 9  
6 ("none of the recorded notices identified the superpriority amount and when [BNYM's]  
7 predecessor asked for the information, the HOA/[A&K] refused to provide it.")).

8 Further, BNYM confuses constitutionally mandated notice with the notices required to  
9 conduct a valid foreclosure sale. Due process does not require actual notice. *Jones v. Flowers*,  
10 547 U.S. 220, 226 (2006). Rather, it requires notice "reasonably calculated, under all the  
11 circumstances, to apprise interested parties of the pendency of the action and afford them an  
12 opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.  
13 306, 314 (1950); *see also Bourne Valley*, 832 F.3d at 1158. Accordingly, BNYM's summary  
14 judgment motion as to quiet title and declaratory relief will be denied.

15 "A first deed of trust holder only has a constitutional grievance if he in fact did not receive  
16 reasonable notice of the sale at which his property rights was extinguished." *Wells Fargo Bank*,  
17 *N.A. v. Sky Vista Homeowners Ass'n*, No. 315CV00390RCJVPC, 2017 WL 1364583, at \*4 (D.  
18 Nev. Apr. 13, 2017). To state a procedural due process claim, a claimant must allege "(1) a  
19 deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate  
20 procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971,  
21 982 (9th Cir. 1998). BNYM has failed on both prongs.

22 Here, BNYM has failed to show that it did not receive proper notice. BNYM's predecessor  
23 in interest, BANA, received a notice of default and election to sell, as well as a notice of sale from  
24 the HOA. Therefore, BNYM's due process argument fails as a matter of law. *See, e.g., Spears v.*  
25 *Spears*, 596 P.2d 210, 212 (Nev. 1979) ("The rule is well established that one who is not prejudiced  
26 by the operation of a statute cannot question its validity.").

27 Accordingly, BNYM's challenge based on due process and *Bourne Valley* fails as a matter  
28 of law, and BNYM's motion for summary judgment will be denied as it relates to these grounds.



1           **B. Rejected Tender Offer**

2           BNYM argues that its predecessor-in-interest preserved the deed of trust by offering, in  
3 letter form, to tender the superpriority amount prior to the foreclosure sale. (ECF No. 74, Ex. 9).  
4 In particular, BNYM asserts that because the HOA/A&K obstructed BNYM's attempt to satisfy  
5 the superpriority portion of the lien by refusing to provide information by which the superpriority  
6 portion of the lien could be calculated, the offer "constituted a valid tender preserving the deed of  
7 trust." (ECF No. 74 at 12). The court disagrees.

8           Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority  
9 portion of an HOA lien to prevent the foreclosure sale from extinguishing that security interest.  
10 See Nev. Rev. Stat. § 116.31166(1); see also *SFR Investments*, 334 P.3d at 414 ("But as a junior  
11 lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security . . . ."); see  
12 also, e.g., *7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et al.*, 979 F. Supp. 2d 1142, 1149  
13 (D. Nev. 2013) ("If junior lienholders want to avoid this result, they readily can preserve their  
14 security interests by buying out the senior lienholder's interest." (citing *Carillo v. Valley Bank of*  
15 *Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers Co.*, 611 P.2d 1079, 1083 (Nev.  
16 1980))).

17           BNYM has not shown that it/its predecessor-in-interest tendered the superpriority amount  
18 prior to the foreclosure sale so as to preserve the first deed of trust. BNYM does not dispute that  
19 it/its predecessor-in-interest failed to pay the amount due prior to the foreclosure sale. Rather,  
20 BNYM argues that the offer to pay discharged BNYM's tender obligation. (ECF No. 74).

21           Tender is proper when the tenderer is "at all times ready, willing, and able to pay" the  
22 amounts owed, even if that amount is improperly rejected. *Ebert v. W. States Refining Co.*, 337  
23 P.2d 1075, 1077 (Nev. 1959). BNYM/its predecessor-in-interest never tendered any amount to  
24 the HOA/A&K. Rather, BNYM/its counsel merely presumed, without adequate support, that  
25 offering to tender its own computation of the amount for the nine-months' common assessments  
26 predating the notice of default was sufficient tender. (ECF No. 38-6); see generally, e.g., Nev.  
27 Rev. Stat. § 107.080 (allowing trustee's sale under a deed of trust only when a subordinate interest  
28 has failed to make good the deficiency in performance or payment for 35 days); Nev. Rev. Stat. §

1 40.430 (barring judicially ordered foreclosure sale if the deficiency is made good at least 5 days  
2 prior to sale).

3 The notice of default recorded April 20, 2011, set forth an amount due of \$2,161.47. (ECF  
4 No. 1). Rather than tendering the \$2,161.47 due so as to preserve its interest in the property and  
5 then later seeking a refund of any difference, BNYM/its predecessor-in-interest elected to send a  
6 letter requesting the amount for the nine-months' worth of assessments owed. *See SFR*  
7 *Investments*, 334 P.3d at 418 (noting that the deed of trust holder can pay the entire lien amount  
8 and then sue for a refund). Had BNYM/its predecessor-in-interest paid the amount set forth in the  
9 notice of default (\$2,161.47), the HOA's/SFR's interest would have been subordinate to the first  
10 deed of trust. *See Nev. Rev. Stat. § 116.31166(1)*. While BNYM asserts that the HOA not  
11 providing this information was wrongful, BNYM offers nothing in support of such assertion. (ECF  
12 No. 74).

13 Now, after failing to use the legal remedies available to it to prevent the property from  
14 being sold to a third party—for example, seeking a temporary restraining order, a preliminary  
15 injunction, and filing a *lis pendens* on the property (*see Nev. Rev. Stat. §§ 14.010, 40.060*)—  
16 BNYM seeks to profit from its own failure to follow the rules set forth in the statutes by invoking  
17 equitable relief. *See generally, e.g., Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa.  
18 1888) (“In the case before us, we can see no way of giving the petitioner the equitable relief she  
19 asks without doing great injustice to other innocent parties who would not have been in a position  
20 to be injured by such a decree as she asks if she had applied for relief at an earlier day.”);  
21 *Nussbaumer v. Superior Court in & for Yuma Cty.*, 489 P.2d 843, 846 (Ariz. 1971) (“Where the  
22 complaining party has access to all the facts surrounding the questioned transaction and merely  
23 makes a mistake as to the legal consequences of his act, equity should normally not interfere,  
24 especially where the rights of third parties might be prejudiced thereby.”).

25 Based on the foregoing, BNYM has not set forth any evidence as to a tender in a sufficient  
26 amount prior to the foreclosure sale, nor has it shown that the HOA's alleged rejection was  
27 wrongful. Accordingly, BNYM's motion for summary judgment will be denied as it relates to this  
28 argument.

1           **C. Commercial Reasonability**

2           The HOA and SFR argue that the foreclosure sale was commercially reasonable because  
3 the sale price (\$9,200.00) was not grossly inadequate given the conditions under which the  
4 property was sold and because BNYM has not presented any evidence of fraud, unfairness, or  
5 oppression. (ECF Nos. 73, 75).

6           BNYM argues that the court should grant its motion because the foreclosure sale for  
7 approximately 2.2% of the property's fair market value is grossly inadequate and because BNYM  
8 can establish evidence of fraud, unfairness, or oppression. (ECF No. 74). However, BNYM  
9 overlooks the reality of the foreclosure process. The amount of the lien—not the fair market value  
10 of the property—is what typically sets the sales price.

11           BNYM further argues that the *Shadow Wood* court adopted the restatement approach,  
12 quoting the opinion as holding that “[w]hile gross inadequacy cannot be precisely defined in terms  
13 of a specific percentage of fair market value, generally a court is warranted in invalidating a sale  
14 where the price is less than 20 percent of fair market value.” (ECF No. 74) (emphasis omitted).

15           NRS 116.3116 codifies the Uniform Common Interest Ownership Act (“UCIOA”) in  
16 Nevada. *See* Nev. Rev. Stat. § 116.001 (“This chapter may be cited as the Uniform Common-  
17 Interest Ownership Act”); *see also SFR Investments*, 334 P.3d at 410. Numerous courts have  
18 interpreted the UCIOA and NRS 116.3116 as imposing a commercial reasonableness standard on  
19 foreclosure of association liens.<sup>3</sup>

20           In *Shadow Wood*, the Nevada Supreme Court held that an HOA's foreclosure sale may be  
21 set aside under a court's equitable powers notwithstanding any recitals on the foreclosure deed

22           <sup>3</sup> *See, e.g., Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1229  
23 (D. Nev. 2013) (“[T]he sale for \$10,000 of a Property that was worth \$176,000 in 2004, and which  
24 was probably worth somewhat more than half as much when sold at the foreclosure sale, raises  
25 serious doubts as to commercial reasonableness.”); *SFR Investments*, 334 P.3d at 418 n.6 (noting  
26 bank's argument that purchase at association foreclosure sale was not commercially reasonable);  
27 *Thunder Props., Inc. v. Wood*, No. 3:14-cv-00068-RCJ-WGC, 2014 WL 6608836, at \*2 (D. Nev.  
28 Nov. 19, 2014) (concluding that purchase price of “less than 2% of the amounts of the deed of  
trust” established commercial unreasonableness “almost conclusively”); *Rainbow Bend  
Homeowners Ass'n v. Wilder*, No. 3:13-cv-00007-RCJ-VPC, 2014 WL 132439, at \*2 (D. Nev.  
Jan. 10, 2014) (deciding case on other grounds but noting that “the purchase of a residential  
property free and clear of all encumbrances for the price of delinquent HOA dues would raise  
grave doubts as to the commercial reasonableness of the sale under Nevada law”); *Will v. Mill  
Condo. Owners' Ass'n*, 848 A.2d 336, 340 (Vt. 2004) (discussing commercial reasonableness  
standard and concluding that “the UCIOA does provide for this additional layer of protection”).

1 where there is a “grossly inadequate” sales price and “fraud, unfairness, or oppression.” 366 P.3d  
2 at 1110; *see also* *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 184 F. Supp. 3d 853, 857–58  
3 (D. Nev. 2016). In other words, “demonstrating that an association sold a property at its  
4 foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a  
5 showing of fraud, unfairness, or oppression.” *Id.* at 1112; *see also* *Long v. Towne*, 639 P.2d 528,  
6 530 (Nev. 1982) (“Mere inadequacy of price is not sufficient to justify setting aside a foreclosure  
7 sale, absent a showing of fraud, unfairness or oppression.” (citing *Golden v. Tomiyasu*, 387 P.2d  
8 989, 995 (Nev. 1963) (stating that, while a power-of-sale foreclosure may not be set aside for mere  
9 inadequacy of price, it may be if the price is grossly inadequate and there is “in addition proof of  
10 some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy  
11 of price” (internal quotation omitted)))).

12 Despite BNYM’s assertion to the contrary, the *Shadow Wood* court did not adopt the  
13 restatement. In fact, nothing in *Shadow Wood* suggests that the Nevada Supreme Court’s adopted,  
14 or had the intention to adopt, the restatement. *Compare Shadow Wood*, 366 P.3d at 1112–13 (citing  
15 the restatement as secondary authority to warrant use of the 20% threshold test for grossly  
16 inadequate sales price), *with St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 213 (Nev. 2009)  
17 (explicitly adopting § 4.8 of the Restatement in specific circumstances); *Foster v. Costco*  
18 *Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012) (“[W]e adopt the rule set forth in the Restatement  
19 (Third) of Torts: Physical and Emotional Harm section 51.”); *Cucinotta v. Deloitte & Touche,*  
20 *LLP*, 302 P.3d 1099, 1102 (Nev. 2013) (affirmatively adopting the Restatement (Second) of Torts  
21 section 592A). Because Nevada courts have not adopted the relevant section(s) of the restatement  
22 at issue here, the *Long* test, which requires a showing of fraud, unfairness, or oppression in addition  
23 to a grossly inadequate sale price to set aside a foreclosure sale, controls. *See* 639 P.2d at 530.

24 Nevada has not clearly defined what constitutes “unfairness” in determining commercial  
25 reasonableness. The few Nevada cases that have discussed commercial reasonableness state,  
26 “every aspect of the disposition, including the method, manner, time, place, and terms, must be  
27 commercially reasonable.” *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 920 (Nev. 1977).  
28 This includes “quality of the publicity, the price obtained at the auction, [and] the number of

1 bidders in attendance.” *Dennison v. Allen Grp. Leasing Corp.*, 871 P.2d 288, 291 (Nev. 1994)  
2 (citing *Savage Constr. v. Challenge–Cook*, 714 P.2d 573, 574 (Nev. 1986)).

3 Nevertheless, BNYM fails to set forth sufficient evidence to show fraud, unfairness, or  
4 oppression so as to justify the setting aside of the foreclosure sale. BNYM relies on its repeated  
5 assertion that merely offering to tender the superpriority amount is sufficient to show fraud,  
6 unfairness, or oppression. However, as the discussed in the previous section, the amount due on  
7 the date of BNYM’s tender was set forth in the notice of default. Rather than tendering the noticed  
8 amount under protest so as to preserve its interest and then later seeking a refund of the difference  
9 in dispute, BNYM chose to merely offer to tender the superiority amount.

10 BNYM also claims that the CC&Rs represented to the public that BNYM’s lien would not  
11 be extinguished by an HOA foreclosure sale. (ECF No. 74).

12 NRS 116.1104 provides that “[e]xcept as expressly provided in this chapter, its provisions  
13 may not be varied by agreement, and rights conferred by it may not be waived.” Nev. Rev. Stat.  
14 § 116.1104; *see also Bayview Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, No. 2:14-  
15 CV-1875-JCM-GWF, 2017 WL 1100955, at \*9 (D. Nev. Mar. 22, 2017) (discussing the reasoning  
16 in *ZYZZX2*); *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 200 F. Supp. 3d 1141,  
17 1168 (D. Nev. 2016) (holding that an HOA’s failure to comply with its CC&Rs does not set aside  
18 a foreclosure sale, due to NRS 116.1104). Accordingly, language in the CC&Rs has no impact on  
19 the superpriority lien rights granted by NRS 116.

20 In addition, this exact argument was addressed and rejected by the court in *SFR Investments*  
21 *Pool 1, LLC v. U.S. Bank N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418-18 (2014).

22 Accordingly, BNYM’s commercial reasonability argument fails as a matter of law as it  
23 failed to set forth evidence of fraud, unfairness, or oppression. *See, e.g., Nationstar Mortg., LLC*,  
24 No. 70653, 2017 WL 1423938, at \*3 n.2 (“Sale price alone, however, is never enough to  
25 demonstrate that the sale was commercially unreasonable; rather, the party challenging the sale  
26 must also make a showing of fraud, unfairness, or oppression that brought about the low sale  
27 price.”).

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